Supreme Court, U.S.
FILED

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

JOHN W. BEHRENS,
Petitioner,

vs.

ROBERT J. PELLETIER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Is Mr. Behrens, a government official who claims qualified immunity, entitled to multiple interlocutory appeals from a denial of that claim in the circumstances of the instant case or may an appellate court limit such interlocutory appeals to one, at a time to be selected by the government official?

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JOHN W. BEHRENS,
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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert J. Pelletier responds to the Petition for Writ of Certiorari of John W. Behrens which seeks to review the order of the United States Court of Appeals for the Ninth Circuit dismissing petitioner's second interlocutory appeal as being precluded by petitioner's first interlocutory appeal.

OPINIONS BELOW

On October 9, 1991, the District Court below upon limited remand from the United States Court of Appeals for the Ninth Circuit entered its Order Re: Substitution of United States for Defendant John W. Behrens. This Order is attached to Respondent's Appendix, *infra*.

STATEMENT OF THE CASE

In May, 1986, Robert J. Pelletier was employed, pursuant to a written employment agreement, as the President and Chief Executive Officer of Pioneer Savings and Loan Association, a California chartered institution whose accounts were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"). He had been so employed for approximately 14 months and his employment had been approved by the California Savings and Loan Commissioner.[1] Indeed, Mr. Pelletier had been employed in the financial institution industry for many years.

It is conceded that on May 8, 1986, Mr. Behrens sent a letter to Pioneer's Board of Directors. This letter essentially directed Pioneer Savings to fire Mr. Pelletier and replace him with someone else. The letter suggested that such action was necessary because several years before Mr. Pelletier had been a senior officer with a financial institution which had recently failed, although Mr. Behrens had no evidence of any improper action by Mr. Pelletier. It is also undisputed that immediately upon receipt of this letter, Pioneer Savings' Directors fired Mr. Pelletier and that subsequently he has been unable to secure any financial institution position.

Mr. Behrens' commanded such obedience from Pioneer Savings because his letter was written under color of federal law on federal regulatory letterhead. At the time of the issuance of his letter, Mr. Behrens was a subordinate "supervisory agent" for the FSLIC and its operating head, the Federal Home Loan Bank Board ("FHLBB"). In that capacity, Mr. Behrens was the line supervisory agent responsible for federal oversight of Pioneer Savings and for recommendations on all regulatory applications concerning that institution. Mr. Behrens, however,

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1 The Petition asserts as if an uncontested fact that Mr. Pelletier's employment was conditional. Such was not the case. While the FHLBB/FSLIC had the power to remove Mr. Pelletier from his position and prohibit him from taking any similar position, Mr. Behrens lacked any authority to approve or disapprove of Mr. Pelletier's employment, to remove him from that employment, or to prohibit him from taking other employment with an insured financial institution.

had no legal authority to approve of Mr. Pelletier's employment nor had Mr. Behrens any lawful power to remove Mr. Pelletier from his position as an officer, such authority having been granted to the FHLBB/FSLIC under appropriate circumstances and subject to administrative due process rights.[2]

In seeking subsequent employment, Mr. Pelletier has been required to disclose the reason for his termination from Pioneer Savings; and upon learning that this termination was based upon regulatory direction, prospective employers have all declined to employ him. Mr. Pelletier also has been utterly unsuccessful in causing Mr. Behrens' letter to be either withdrawn or retracted by the appropriate Federal agencies.

As a result, Mr. Pelletier became essentially unemployable during the time in his life when his income should have been at its highest and provided him and his wife with retirement funds. After nine years, Mr. Pelletier has become technically obsolete in his field. Mr. Pelletier and his wife lost their savings, their vacation property, and ultimately their home. They now reside in a trailer and subsist on Social Security retirement benefits.

In the meantime, Mr. Behrens has bragged to a fellow supervisory agent that he was finally able to "get rid of Pelletier".

When it became clear that he was unemployable, Mr. Pelletier commenced this action in February, 1989, and for the last six years has been attempting to cause this action to be tried. The action now consists of two claims: A claim for money damages for violation of Constitutional rights as against Mr. Behrens under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and a separate claim for negligence against the United States under the Federal Tort Claims Act (28 *U.S.C.* § 2671, *et seq.*). The action was set for trial on May 16, 1995, after numerous prior trial dates were vacated or continued because of

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[2] See former 12 *U.S.C.* § 1730 (g),(h) and (q) then applicable.

Mr. Behrens' delaying tactics. Further proceedings in the Court below have been stayed by Justice O'Connor as Circuit Justice.

Mr. Behrens, currently a government employee and represented in the District Court by Department of Justice lawyers apparently at taxpayer expense, has managed to avoid a trial on the merits utilizing every conceivable delaying tactic.

After successfully evading service of process for some time, Mr. Behrens' first appearance was by motion to dismiss based upon a claim of qualified immunity. (At the same time, Mr. Behrens moved for summary judgment but refused to submit to a deposition.)

The District Court's first review of the qualified immunity claim occurred in September, 1989, when the District Court denied Mr. Behrens' request to stay discovery. The Ninth Circuit's first review of Mr. Behrens' qualified immunity claim when he sought a stay of discovery from that Court, which was denied.

In October, 1989, the District Court denied the motion to dismiss for qualified immunity on the merits and denied the summary judgment motion as premature until discovery was provided. The District Court did, though, limit Mr. Pelletier's claims to conduct occurring within one year of suit.

Mr. Behrens appealed both orders to the Ninth Circuit, which then became his second appellate review of his claim to qualified immunity. At the same time, Mr. Behrens appealed the apparent denial of his request to have the United States substituted in his place as to the common law tort claims.

While the appeal was being briefed and argued, Mr. Behrens undertook no effort to renew his motion for summary judgment previously denied as premature. Instead, Mr. Behrens relied on his interlocutory appeal to the Ninth Circuit to extricate himself from the litigation.

The Ninth Circuit made a limited remand for a decision on Mr. Behrens' substitution request. This limited remand resulted

in the District Court's October 9, 1991, Order Re: Substitution, etc. (Respondent's Appendix, *infra*). That Substitution Order specifically found that Mr. Behrens' May 8, 1986 letter to Pioneer Savings caused Pioneer to remove Mr. Pelletier from his job and that Mr. Behrens lacked the authority to order such a removal.

While the appeal was pending, Mr. Pelletier was concerned about the effect of repetitive interlocutory appeals on his ability to secure a prompt trial. In his opening brief to the Ninth Circuit in the first appeal, Mr. Pelletier questioned whether interlocutory appeals should be permitted from denials of motions to dismiss because interlocutory appeals concerning qualified immunity were subject to abuse by governmental defendants who used the appeal process to delay and harass. Mr. Pelletier asserted that such interlocutory appeal should be restricted to appeals from denial of motions for summary judgment and that sanctions should be awarded for frivolous appeals. Thus, from the outset, the issue of multiple interlocutory appeals and their effect upon injured plaintiffs was raised by Mr. Pelletier and Mr. Behrens made the apparent decision to proceed with the appeal notwithstanding the multiple appeal argument.

As trial approached in the District Court and no decision had been rendered on the appeal, the Ninth Circuit in January 1992, stayed further proceedings pending its decision. The Ninth Circuit's stay order remained in force until September, 1993, when the action was finally remanded to the District Court; thus, Mr. Behrens first interlocutory appeal caused a two year trial delay.

On June 29, 1992, the Ninth Circuit issued its opinion in *Pelletier vs. Federal Home Loan*, 968 F.2d 865 (9th Cir. 1992). By that opinion, the Court affirmed the denial of the motion to dismiss and dealt with the purely legal issue which could be raised on such an interlocutory appeal. The Court held that Mr. Pelletier had asserted a violation of a clearly established right to pursue a chosen profession free of governmental interference, even thought the Court did not reach the issue of whether Mr. Pelletier's specific employment with Pioneer Savings was

similarly protected. The Court also ordered the United States substituted for Mr. Behrens on the common law claims finding that the District Court had applied the wrong standard for review but without disturbing the facts so found to exist.

The Ninth Circuit also specifically addressed the multiple interlocutory appeal "abuse" issue raised by Pelletier. The Court noted that

> Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one.
> *Pelletier* at 870.

The Ninth Circuit then held that "One such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Pelletier* at 871. In reaching this holding, the Ninth Circuit provided that the government official is entitled to make the strategic choice of whether to file an interlocutory appeal from the denial of a motion to dismiss or wait and appeal the denial of summary judgment. Moreover, the Court considered that an interlocutory appeal from the denial of a claim for qualified immunity raises only a purely legal issue for review and, thus, "should not require more than one judiciously timed appeal." *Pelletier* at 871.

The foregoing single interlocutory appeal holding was not ignored by Mr. Behrens. Indeed, in August, 1992, Mr. Behrens filed his Petition for Panel Rehearing. By that Petition, Mr. Behrens sought to have the Ninth Circuit reconsider its ruling on qualified immunity and also delete from its opinion that portion which limited him to one interlocutory appeal. By Order, filed September 24, 1993, Mr. Behrens' Petition was unanimously denied.

No Petition for a Writ of Certiorari was sought by Mr. Behrens seeking a review by this Court of either holding.

Mr. Behrens first interlocutory appeal took four years to decide before it was remanded to the District Court. After the case was ready for trial, the first interlocutory appeal delayed the trial for nearly two years. Throughout this time period, Mr. Pelletier remained without work and without the self respect which flows from working in his chosen field.

When the action returned to the District Court, Mr. Behrens filed a new motion for summary judgment on the basis of qualified immunity. Mr. Pelletier also moved to reinstate his *Bivens* claim to the extent previously held as untimely and Mr. Behrens stipulated to the granting of that motion.

There were no new legal theories advanced in the summary judgment motion which were not or could not have been made during the earlier motion to dismiss. Moreover, the discovery and concessions had strengthened Mr. Pelletier's case. The Substitution Order of the District Court was to the effect that Mr. Behrens knowingly exceeded his authority in writing the letter directing termination. Nevertheless, Mr. Behrens utilized the pendency of this new motion to further delay trial and pre-trial proceedings. The motion for summary judgment was denied by the District Court on September 7, 1994.

At the time of this summary judgment denial, the District Court had scheduled the pre-trial conference for December 5, 1994, and the trial for January 10, 1995. Pursuant to local rule, the parties were required to meet and exchange all trial exhibits, witness lists, expert reports and trial contentions forty days before the pre-trial conference (October 25, 1994). To avoid these responsibilities, Mr. Behrens filed a new notice of appeal, thus, attempting to initiate his second full interlocutory appeal and at least his sixth interlocutory review of his qualified immunity defense. At the same time, Mr. Behrens' counsel notified all parties that in her view the filing of the notice of appeal resulted in the automatic imposition of an stay of proceedings in the District Court. Based upon that interpretation, Mr. Behrens refused to participate in pre-trial proceedings and attempted to cancel expert depositions.

Mr. Pelletier responded to these further delaying tactics by immediately filing a motion in the Ninth Circuit to dismiss the appeal for lack of jurisdiction and an application in the District Court to have the appeal certified as frivolous. On November 7, 1994, the District Court, in fact, found the appeal to be frivolous and thereby put the action back on track for trial. Mr. Behrens then applied to the Ninth Circuit for a stay of proceedings in the District Court.

On November 17, 1994, the Ninth Circuit ruled on the motion to dismiss and the stay application. The Court dismissed the appeal for lack of jurisdiction and denied the stay application.

Mr. Behrens' writ petition and application for stay to this Court followed.

SUMMARY OF THE ARGUMENT

Mr. Behrens seeks to have this Court permit him to further delay the trial of this action for several more years while he processes a second full interlocutory appeal which will not affect whether he must stand trial. In order to secure this result, Mr. Behrens asks this Court to fashion a uniform rule that government officials are entitled to prosecute unlimited interlocutory appeals even though the limited issue on appeal is purely a question of law.

In an attempt to secure review by this Court, Mr. Behrens asserts that there is a conflict among the circuits although no circuit has yet held that multiple interlocutory appeals are required and those circuits who have actually decided the issue on the merits have all denied multiple appeals.

Mr. Behrens next asserts that this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) mandates that a governmental defendant is entitled to serial interlocutory appeals every time his assertion of qualified immunity is rejected. It is submitted that this assertion is a misreading of *Mitchell*.

Finally, it is submitted that this Petition should be denied because Mr. Behrens could have raised the issue of an entitlement to serial appeals to this Court in 1993 when the Ninth Circuit refused to delete the "one interlocutory appeal rule" from its opinion in *Pelletier* and his delay until now should be viewed merely as an improper tactic.

ARGUMENT

This Court in *Mitchell* held that a governmental official is entitled to an interlocutory appeal from the denial of his claim to qualified immunity. Mr. Pelletier does not dispute this holding nor does the Petition seek to review the holding. Indeed, Mr. Behrens secured an interlocutory review by the Ninth Circuit and that review is reported in *Pelletier v. Federal Home Loan*, 968 F.2d 865 (9th Cir. 1992).

Mitchell also holds that an interlocutory appeal from the denial of a claim for qualified immunity is a limited appeal on a purely legal issue - whether a "clearly established right" is asserted to have been violated. As stated by this Court:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's view of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.[9]

9. We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some

> cases, the defendant) support a claim of violation of clearly established law.

Mitchell, at 528.

By his Petition, Mr. Behrens essentially seeks a review of this holding and would have this Court hold that this purely legal issue should be the subject of multiple interlocutory appeals as he forum shops for an appellate panel which supports his view of the law.

In *Pelletier, supra*, at 871-73 , the Ninth Circuit held that Pelletier had alleged a violation of a clearly established right in the form of a Constitutionally protected liberty interest in employment. While the Ninth Circuit did not at that time decide whether Mr. Pelletier had a Constitutional right to his job with Pioneer Savings, it did hold that he had a Constitutional right to pursue his chosen profession free of governmental interference of the type allegedly caused by Mr. Behrens.

In denying Mr. Behrens' second motion for summary judgment, the District Court held again that Mr. Pelletier has a Constitutionally protected right to pursue his chosen profession free of unreasonable governmental interference, which is precisely the legal issue previously affirmed by the Ninth Circuit in *Pelletier*. The District Court also held that Mr. Pelletier had a Constitutionally protected right to his employment with Pioneer Savings free of unreasonable governmental interference.

While Mr. Behrens is correct that he has not had an opportunity to test the latter issue (right to Pioneer employment) by interlocutory appeal, he has already tested and lost the first issue (right to future employment) and must stand trial on the first issue regardless of the outcome of any interlocutory appeal on the second issue. Mr. Behrens' only hope of avoiding trial is then to secure a second interlocutory appeal on precisely the same interlocutory issue decided in *Pelletier* in the hope that a different panel of the Ninth Circuit may be persuaded to reach a different result. *Mitchell* demands no such opportunity for multiple appeals and forum shopping.

A. There Exists No Conflict Among the Circuits.

The "conflict among the circuits," claimed by Mr. Behrens, does not exist. In no case cited by Mr. Behrens has a Federal Court of Appeals heard a second interlocutory appeal on qualified immunity grounds. Out of five cases cited for the "two interlocutory appeal" rule, only one even contains *dictum* supporting such a rule.

Mr. Behrens contends that the Third, Sixth, and Eighth Circuits have allowed two interlocutory appeals on the issue of qualified immunity. Even a superficial reading of the opinions cited by Mr. Behrens discloses that only the Sixth Circuit has even addressed the subject and did so in *dictum*.

Mr. Behrens' only Third Circuit authority fails to create any conflict among the circuits. *Kulwicki v. Dawson*, 969 F.2d 1454, 1460 n.5 (3rd Cir. 1992) merely contains a footnote commenting that an interlocutory appeal of a District Court's denial of qualified immunity might be appealed either after the denial of a motion to dismiss or after the denial of a motion for summary judgment. Contrary to Mr. Behrens' portrayal of the case, *Kulwicki* contains no *dictum* stating that multiple interlocutory appeals are permitted on the issue of qualified immunity.

Mr. Behrens' only Eighth Circuit authority fails to create any conflict among the circuits. *Murphy v. Moore*, 849 F.2d 1101 (8th Cir. 1988), involves a single interlocutory appeal of a denial of absolute immunity. The opinion addresses interlocutory appeals of the denial of qualified immunity only indirectly, and never addresses the issue of multiple interlocutory appeals of the denial of qualified immunity.

In *Murphy*, the plaintiff sued, *inter alia*, a Missouri assistant attorney general, Ms. Mescher. Ms. Mescher moved to dismiss on the grounds of absolute immunity and her motion was denied. She appealed the court's denial of her motion, and Mr. Murphy moved to dismiss the appeal on the grounds that it was premature, arguing that Ms. Mescher's appeal should be denied until her right to qualified immunity had also been

denied. *Murphy, supra* at 103. The Eighth Circuit denied Mr. Murphy's motion and allowed Ms. Mescher to appeal the denial of absolute immunity. In *dictum*, the court commented that Ms. Mescher would be able to pursue a second interlocutory appeal on the previously undecided issue of qualified immunity. The court did not address either directly or otherwise the question of whether a defendant might pursue two interlocutory appeals on the question of qualified immunity.

Mr. Behrens' three Sixth Circuit opinions include only one which arguably -- and only in *dictum* -- supports his position on the issue presented by his Petition. However, closely examined, that support is illusory.

In *Sinclair v. Schriber,* 834 F.2d 103, 104 (6th Cir. 1987), the Court of Appeal dismissed for lack of jurisdiction an interlocutory appeal from an order "denying defendant's motion for summary judgment on the basis of good-faith immunity."

English v. Dyke, 23 F.3d 1086 (6th Cir. 1994) involves only a single appeal of the denial of qualified immunity. Mr. English, a prisoner, sued *pro se* over a change in his security classification and transfer to temporary segregation. *English supra* at 1088. Defendants moved to dismiss on the grounds that Mr. English had no liberty interest in his security classification, and the motion was denied.

Defendants then answered, and subsequently moved for summary judgment on qualified immunity grounds. The District Court denied that post-answer summary judgment motion on the grounds that the arguments were no different from those defendants made in their pre-answer motion to dismiss. Defendants then filed their only interlocutory appeal. The Court of Appeal disagreed with the District Court on the similarity between the two motions:

> The pre-answer motion asked the court to decide whether defendants' actions as alleged in the Complaint, violated plaintiff's constitutional rights. The second motion, based on qualified immunity, asked the court to decide whether defendants' alleged actions

> violated plaintiff's rights under clearly established law. A decision in plaintiff's favor on the first question did not require a decision for plaintiff on the question of qualified immunity.
> *English*, at 1103 (emphasis added).

English, then, raises no issue regarding the propriety of a second interlocutory appeal on grounds of qualified immunity.

Finally, *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), does contain a discussion of whether two interlocutory appeals should be allowed on grounds of qualified immunity. That discussion, however, is purely *dictum*, because the case itself involves no second interlocutory appeal.

The Sixth Circuit panel speculated that two interlocutory appeals might be permitted where the first was from an order denying qualified immunity at the pleading stage because the plaintiff had pled facts which, if proven, would describe a violation of clearly established law, and where the second was from an order denying summary judgment on the grounds that plaintiff has produced sufficient evidence of a violation of clearly established law to proceed to trial. *Kennedy, supra*, at 299. However, not only is that discussion *dictum*, it is also inapposite to the instant case where the facts are not in dispute.

Moreover, the support Mr. Behrens finds in *Kennedy* is also contrary to *Mitchell's* holding that the interlocutory appeal only concerns a purely legal issue of whether the law was clearly established at the time it was allegedly violated. An appeal from an order denying summary judgment on the grounds that there is a triable issue of fact as to whether the defendant's conduct is violative of some admittedly clearly established law is not an appeal from an order denying a defendant the protection of qualified immunity. Rather, if the law is clearly established, the court's finding of triable issues of fact as to whether that clearly established law has been violated by the defendant's conduct differs in no material way from the finding required of any summary judgment motion. For this reason, the *Kennedy* dictum is inapposite to the instant case where the facts are not in dispute and, indeed, contrary to *Mitchell's* admonition

that "[a]n appellate court . . . need not consider the correctness of the plaintiff's version of the facts . . . ." *Mitchell* at 528.

B. *Mitchell* Does Not Mandate Multiple Interlocutory Appeals.

Mr. Behrens correctly notes that three circuits limit a governmental defendant to only two appeals from a denial of a claim for qualified immunity. One appeal is interlocutory and one appeal is from the final judgment. This permits a governmental defendant one more appeal than the plaintiff receives.

The Ninth Circuit's position is stated in *Pelletier, supra*, as reaffirmed in *Nelsonv. Silverman*, 999 F.2d 417 (9th Cir. 1993) and *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460-461 (9th Cir. 1994). The Seventh Circuit's decision is found in *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990) and the First Circuit's decision in *Kaiter v. Town of Boxford*, 836 F.2d 704, 707-708 (1st Cir. 1988), both of which opinions predate *Pelletier*. Indeed, *Kaiter* predates Mr. Behrens' first appeal to the Ninth Circuit and was undoubtedly known by his Department of Justice trial and appellate lawyers when Mr. Behrens made the decision to prosecute an interlocutory appeal at that time.

Mr. Behrens fails, however, to provide any substantial argument for the proposition that differing Circuit rules is improper. Instead, he asserts that *Mitchell* mandates that governmental defendants be allowed essentially unlimited multiple interlocutory appeals and any limitation on that right is erroneous. *Mitchell* provides no such holding.

In *Mitchell*, the defendant (former attorney general John Mitchell) was sued over a warrantless wiretap by Forsyth. After the wiretap but before the lawsuit began, this Court held, in *United States v. United States District Court* (Keith), 407 U.S. 297 (1972), that the Fourth Amendment did not permit warrantless wiretaps in circumstances like those involving Forsyth. That holding led to Forsyth's action against Mitchell and the issue of whether the *Keith* rule applied retroactively.

On cross-motions for summary judgment, after five years of litigation, the District Court denied Mitchell summary judgment on the issue of absolute immunity. At the same time, it considered the retroactive effect of *Keith* and it considered Mitchell's claim of qualified immunity relying upon subjective standard applied to qualified immunity claims prior to this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The District Court ruled that neither party was entitled to summary judgment on the issue of qualified immunity because neither side had met its burden of proving that no triable issue of fact existed as to Mitchell's good faith.

Mr. Mitchell prosecuted an interlocutory appeal on the District Court's denial of absolute immunity and not on the District Court's denial of summary judgment on qualified immunity.

The Third Circuit remanded the case for further fact finding on the question of whether the wiretap served a prosecutorial purpose. The District Court received evidence on this point and ruled that it did not. At the same time, the District Court reconsidered its ruling on qualified immunity in light of the new *Harlow* "objective" standard. On the issue of qualified immunity, the District Court held that *Keith* was merely an extension of existing law, and that Mitchell had gambled on a change in the law and lost. The District Court denied Mitchell's motion and granted Forsyth's motion as to liability.

Mitchell appealed again, contending that he was entitled to both qualified and absolute immunity. This appeal was the first time Mitchell had raised qualified immunity on appeal. The Court of Appeals held against Mitchell and he sought review in this Court.

Accordingly and contrary to Mr. Behrens' argument, *Mitchell* does not hold that a governmental defendant is entitled to more than one interlocutory appeal on the issue of qualified immunity. The issue was not raised.

Since this Court ruled that the issue on an interlocutory appeal is a limited, legal issue, such consideration suggests that

there be merely one well timed appeal to resolve the narrow legal issue. *Pelletier* is consistent with this holding as are the other decisions limiting governmental defendants to one interlocutory appeal of the narrow, legal issue so reviewable.

When Mr. Behrens in 1989 first appealed the denial of his motion to dismiss, Mr. Pelletier asserted that *Mitchell* did not provide authority for an interlocutory appeal from a motion to dismiss denial but only from a summary judgment denial. As noted above, *Mitchell* in fact involved an interlocutory appeal after competing summary judgment motions. In adopting the one interlocutory appeal limitation, the Ninth Circuit in *Pelletier* in essence expanded governmental defendants' appeal rights to include appeals from denials of motions to dismiss and left to governmental defendants the choice of when best to raise the purely legal issue permitted on such an interlocutory appeal. Mr. Behrens now does not like the choice which he made.

C. Mr. Behrens Should Not Be Rewarded For His Tactical Delay in Seeking Review by this Court.

Were this Court inclined to review the one well-timed interlocutory appeal rule, this is not the case in which to consider the issue as Mr. Behrens has unconscionably delayed seeking such review. The time for this review should have been in 1993 when the rule was announced and the Ninth Circuit refused to modify its opinion to delete the rule. However, Mr. Behrens chose not to seek review of this Court at that time.

The Court's which have imposed a "one interlocutory appeal" rule have attempted to balance the equities in view of the reality of knee-jerk appeals from every denial of qualified immunity. As stated by the Ninth Circuit in *Nelson, supra* at 418:

> The opportunity to appeal an adverse qualified immunity ruling in advance of trial serves the important purpose of preserving the role of the defense as "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, 105 S. Ct. at

> 2815 (emphasis in original). However, these appeals also exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets. In *Pelletier*, we reasoned that one appeal should be sufficient to resolve the legal issues pertinent to a claim of qualified immunity, and hence, that the price is worth paying once but not repeatedly.

The Ninth Circuit's analysis could not have been closer to the mark in this case. Mr. Behrens has clearly attempted to impose on Mr. Pelletier substantial expense and delay lasting for years. The conduct has thoroughly disrupted the docket of the Court below. Nevertheless, Mr. Behrens seeks to have Mr. Pelletier run the same gamut again and to do so on the eve of trial.

As stated by the Seventh Circuit in *Abel, supra* at 396:

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not.

Mr. Behrens argument, if taken to its logical extreme, would never permit a civil rights plaintiff to have his day in court. First, a governmental defendant would move to dismiss the complaint and appeal the denial. Then, the governmental defendant would move for summary judgment and appeal the denial. Every time the matter is remanded, a new motion for summary judgment would then be filed and its denial appealed. Every new appellate case would be ground for reconsideration

in the trial court and a follow-up appeal. There would be no end in sight.

Constantly preparing for trial only to have the trial continued by last minute delaying tactics is expensive, time consuming and emotionally exhaustive. Trial witness necessary to give life to a plaintiff's case retire, move out of area and even die making it necessary to rely on dry deposition testimony. In this action, Mr. Behrens' supervisor has left government employment during these delays and may refuse to return for trial.

Mr. Behrens has already had one interlocutory appeal which he commenced in December 1989 and which resulted in a stay which lasted until September 24, 1993. At that time, the Ninth Circuit unanimously denied Mr. Behrens' Petition for Panel Rehearing, which sought to eliminate the "one interlocutory appeal" rule. Nevertheless, Mr. Behrens sought no review from this Court. He should not be allowed to prosper from his delaying tactics.

CONCLUSION

Mr. Pelletier has waited nearly six years for a trial on the merits of his claims. Four of those years have been spent in a prior interlocutory appeal. As a result of the first appeal, the Ninth Circuit has held that one of the two violations of Mr. Pelletier's Constitutional rights committed by Mr. Behrens was indeed clearly established at the time of the violation. Mr. Behrens now demands a second interlocutory appeal to reconsider the ruling of the first appeal and also review whether the second violation involved a clearly established Constitutional right.

The Ninth Circuit denied Mr. Behrens a second bite of the same apple. Had it permitted an interlocutory appeal only as to the previously undecided issue, Mr. Behrens would still be required to stand trial regardless of the outcome of the second appeal. As a result, no purpose is served by an interlocutory appeal.

Mr. Behrens also had an opportunity to seek review of this Court in 1993 when the "one interlocutory appeal" rule was announced but chose not to file a Petition.

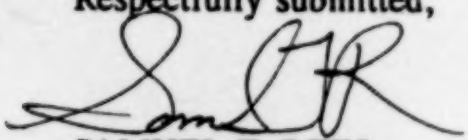
Mr. Behrens asserts that there is now a conflict among the circuits on this issue but a review of the cases shows such not to be the case.

Reliance on *Mitchell* to support a "repeated interlocutory appeal" rule is misplaced both factually and based upon the limited nature of the interlocutory appeal permitted.

Mr. Pelletier submits that the Petition for Writ of Certiorari should properly be denied.

Dated: March 2, 1995

Respectfully submitted,



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Robert J. Pelletier
Plaintiff

vs.

Federal Home Loan Bank of
San Francisco, et al.,
Defendants.

NO. CV 89-0969-RMT (Tx)

ORDER RE: SUBSTITUTION OF
UNITED STATES FOR DEFENDANT
JOHN W. BEHRENS

FILED
October 8, 1991
Clerk, U.S. District Court
Central District of California

This matter has come before the court on the order by the court for the parties to file further briefing on whether the United States should be substituted as defendant in place of defendant John W. Behrens ("Behrens") for the common law tort claims. Having considered the pleadings and other documents filed herein, the court finds the following:

1. Behrens was a federal employee when he sent the May 8, 1996 letter to Pioneer Savings and Loan Association ("Pioneer") because he was acting in the capacity of Supervisory Agent for the Federal Home Loan Bank Board ("FHLBB"), a federal agency.

2. The May 8, 1996, letter sent by Behrens to Pioneer directed Pioneer to remove plaintiff from his position as managing officer.

3. FHLBB had the authority to remove plaintiff from his position as managing officer, and FHLBB had the power to delegate this authority to any of its supervisory agents. 12 U.S.C. §1437(a). However, there is no evidence that FHLBB had the power to delegate this authority to order removal of Pelletier form his position as Managing Officer.

4. Additionally, because the Principal Supervisory Agent, James M. Cirona ("Cirona"), did not have the authority to order removal of plaintiff without prior approval of FHLBB, and because there is no evidence that FHLBB authorized Cirona to remove plaintiff, Cirona, could not have delegated the authority to remove to Behrens. 12 C.F.R. §501.11(c), (d) and (g).

5. Therefore, Behrens was not acting within the scope of his employment when he ordered Pioneer to remove plaintiff from his position as managing officer.

Accordingly,

IT IS ORDERED that the United States should not be substituted for defendant John W. Behrens for the common law tort claims.

Dated: 10-4-91

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge